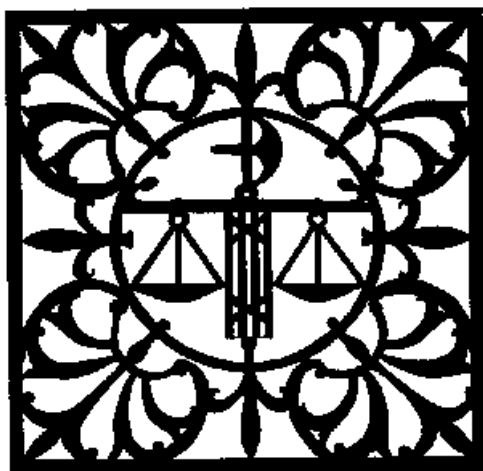


Gender and Justice:

Implementing Gender Fairness in the Courts



Progress Report

**Nebraska Supreme Court
Gender Fairness Implementation Committee**

December 1998

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Introduction

The Nebraska Supreme Court Task Force on Gender Fairness was established in 1991 and issued a report on its findings and recommendations in December of 1994. Included was a general recommendation to establish a committee to assist in implementing specific task force recommendations. In August of 1995 Justice John Gerrard was appointed by the Nebraska Supreme Court to serve as chairperson to a Gender Fairness Implementation Committee and committee members were also appointed.

The purpose of the Gender Fairness Implementation Committee is to continue the work of the Task Force. The membership of this committee has included representatives from the judiciary, court administration, bar, law schools and lay persons. The following established duties of this committee continue to be ongoing:

- # Ensure that educational programs address the needs determined by the Task Force.*
- # Publicize the findings of the task force and make further recommendations based on the implementation of the task force recommendations.*
- # Monitor positive progress and identify new problem areas.*
- # Seek funding for implementation of the task force recommendations and any additional studies deemed necessary.*
- # Evaluate progress on a regular basis.*

The Gender Fairness Implementation Committee has worked for more than three years. Most of the work of this body has been accomplished in subcommittees in the areas of Education, Courtroom Interaction, Litigation, and Domestic Violence and Sexual Assault. Several formal and informal meetings have occurred since the committee's first meeting in October of 1995. The Nebraska Supreme Court published its first report on the status of several recommendations from the Gender Fairness Implementation Committee in October of 1996. The Committee continues to meet to discuss progress of the subcommittees.

The following is the second progress report summarizing, by subcommittees, the continued work of this dedicated committee in promoting gender fairness in the Nebraska state courts. Some projects involve more than one subcommittee. The Nebraska State Bar Association and the Nebraska State Bar Foundation are also committed to gender fairness in the courts and the legal profession. Their work with the Nebraska Supreme Court Gender Fairness Implementation Committee, as well as their own efforts, has energized and strengthened several projects of the Committee.

The Education Subcommittee

The Education subcommittee recognizes that education needs to be ongoing and is essential in the process of eliminating bias in the courts. The subcommittee initially listed several recommendations for consideration. Many of these recommendations have been achieved. The continued involvement of the Nebraska State Bar Association and the Nebraska State Bar Foundation has been invaluable in assisting with many of these projects.

Recommendations:

Develop a comprehensive educational format including the incorporation of gender fairness training into judicial education programs and court personnel programs; and encourage the incorporation of gender fairness training in all Nebraska Continuing Legal Education (NCLE) programs.

The education format should be monitored and updated on an annual basis to ensure that gender fairness training is being interwoven with other aspects of training for judges, lawyers, and court personnel.

To help achieve the above recommendations, the Education Subcommittee developed additional recommendations for specific groups. Although most of these recommendations are ongoing and some areas of achievement are repeated under more than one group, the following lists the progress by specific group:

Attorneys as employers, colleagues, and officers of the court.

1. Have gender fairness issues included periodically in the discussions held at Bench/Bar Conferences.

The Nebraska State Bar Association offered a session on gender fairness at the May 1997 Bench Bar conference with Justice John Gerrard and Attorney Thom Cope as presenters.

2. NCLE should encourage individuals chairing the various continuing legal education seminars to include gender fairness issues as they apply to the particular substantive areas being presented. (i.e., Employment Law, Family Law, Criminal Law, Damages, Tax, and Corporate Partnership Law.)

The Nebraska State Bar Association reported to the Implementation Committee in April of 1997 that The Nebraska Continuing Legal Education (NCLE) has produced a planning packet for chairpersons with guidelines for selecting faculties that encourage gender and geographic diversity in representation.

3. *Seek funding for, and commission the development of, a video on gender fairness that could be made available to seminar presenters or persons seeking programs on the topic, i.e., local bar associations.*

The Education Subcommittee is working with the Litigation Subcommittee in the production of a videotape for presentation on issues of gender fairness in litigation matters. The video will address the impact and recognition of gender bias with our judicial system and profession. The videotape will be accompanied by a discussion guide for use in educational sessions of our justice system as well as the legal profession generally. The video and discussion guide will be modeled after similar projects in Minnesota but will be specific to the practice of law in Nebraska and will be adapted for use by members of the judiciary and the Nebraska legal profession. The Minnesota Bar Association has given permission to use the raw footage of their gender fairness tape as well as a discussion guide. A strategy team will be formed to facilitate the use of the tape. A pool of discussion leaders will be selected using local judges and the local bar leadership to help make discussions more relevant to local bar associations. The Nebraska State Bar Association and a grant from the Nebraska State Bar Foundation will help fund this project.

4. *Through NCLE, develop a “Train the Trainer” program to encourage both men and women to be trained to present the issue at local bar association meetings, community organization meetings, etc.*

See #2 above.

5. *Encourage local bar associations to have gender fairness as a topic of discussion at its meetings.*

A videotape, *All Things Being Equal*, was identified as a resource available for checkout through the Nebraska Law School. This resource is in addition to the videotape project underway by the Education and Litigation Subcommittees for presentation on issues of gender fairness in litigation matters.

6. *The Bar Association House of Delegates should be encouraged to adopt a resolution stating the NSBA’s commitment to eliminate gender-based discrimination within the profession and within Nebraska’s judicial system.*

See *Courtroom Interaction Subcommittee Report*

7. *The NSBA should distribute the pamphlet “Fair and Effective Interviewing” to all members of the NSBA addressing the attorney as an employer and avoiding gender bias in that role.*

As part of educating attorneys involved in the hiring process, the UNL-Law school now sends attorneys a pamphlet on fair and effective interviewing.

8. *Develop articles on gender fairness issues for inclusion in the Omaha and Lincoln Bar Associations’ newsletters and the NSBA Bar Journal.*

The Implementation Committee and the Nebraska State Bar Association jointly agreed to publish a series of articles in *The Nebraska Lawyer* designed to educate Nebraska attorneys about gender bias issues. To date, two articles on gender fairness (*July 1997 and September 1997*) have been published in *The Nebraska Lawyer*. An article is planned as a follow-up to the Mixed Blood Theater presentation at the October 1998 Bar meeting. (See #9 below)

9. *Encourage that the issues of gender fairness are addressed periodically at the annual Bar meeting.*

The Minneapolis based “Mixed Blood Theater” performed at the October 1998 annual meeting of the State Bar Association. The presentation involved a theater-based production that addressed the recognition and elimination of bias and the promotion of diversity in the legal profession. More than 130 participants were present. A panel of Justice Gerrard, Harold Kay, Bill Riley, Brenda Council, Amie Martinez, and Judge Mary Likes followed the production. The panel and the discussion sessions were very effective in encouraging meaningful exchanges on a variety of diversity issues. Participation by minority bar members added much to the discussions.

The Women in the Law section also had a panel and discussion on gender and other diversity issues at the 1998 annual meeting of the State Bar Association.

Judges and Court Staff

1. *Judges should receive periodic training and education concerning the effects of gender bias on attorneys, court personnel, judges, witnesses and juries, and methods for avoiding it. The training should heighten the awareness of judges to the possibility that gender is influencing their decision-making. If possible, this training should be provided in a form that involves judges as active participants and not merely as an audience.*

This is an ongoing process. As part of further educating the judiciary, a copy of the article, “Gender Bias in the Courts, What can judges do” from the July/August *Judicature* was sent to all judges with a copy of the handbook on *Guidelines for Gender Fairness*. The article emphasized the critical role judges play in promoting equality of treatment for women and men in the courts. The handbook was meant to serve as a reminder.

2. *Seek funding for and commission the development of a gender fairness curriculum to be included in new judge orientations. A short video presentation may be the best way to deliver the message.*

To be done.

3. *Encourage the inclusion of gender fairness issues for discussion at the annual meetings of the county judges and the district judges. Secure the commitment by members of these organizations (both male and female) to actively promote the concerns of the Gender Fairness Task Force and to encourage discussions as to how judges can help to improve the situation in the courts with respect to those issues.*

Ongoing.

4. *Periodically review the Code of Judicial Conduct to determine if it adequately addresses a judge's responsibility and duty to perform their duties without bias or prejudice and their duty to not permit staff, court officials and others, subject to the judge's direction and control, to do so as well.*

See Courtroom Interaction Subcommittee report.

5. *The Implementation Committee or the State Court Administrator's office should develop a letter or write articles to be distributed to judges and court staff advising them of their obligation not to discriminate based upon gender and notifying them of the legal consequences of doing so, i.e. lawsuits against them for discrimination or sexual harassment, lawsuits against the state for their action.*

All judges and all court staff were sent a copy of the Nebraska Supreme Court Workplace Harassment Policy in November, 1998, reminding them of their responsibility to eliminate discrimination in the workplace.

6. *Court staff throughout the state should receive periodic training and education addressing gender fairness, promoting neutral hiring procedures, and equitably enforcing gender-neutral personnel policies. Gender-neutral management practices should be adopted in all courts and court related units. Training programs should be monitored to ensure equal access and participation by male and female employees.*

This is ongoing. All employees in the Nebraska Supreme Court Personnel System have received the handbook on gender fairness.

7. *Educate court personnel to treat all female judges, attorneys, litigants, witnesses and other court personnel in a professional manner and with equal deference and respect accorded their male counterparts and to avoid stereotyping based on gender.*

This is ongoing. The handbook on gender fairness includes suggestions for court personnel to avoid behavior that is gender biased.

8. Have gender fairness issues included periodically in the discussions held at Bench/Bar Conferences.

The Nebraska State Bar Association offered a session on gender fairness at the May 1997 Bench Bar conference with Justice John Gerrard and Attorney Thom Cope as presenters.

Judicial Nomination Commissions

- 1. Develop or revise the curriculum for members of judicial nominating commissions to address gender fairness issues.*
- 2. Seek funding for and commission the development of a short video presentation on gender fairness (may also address racial, disability and other related issues of fairness as well) to be shown at the beginning of the work of each commission.*
- 3. Encourage the chairperson of each commission to communicate to members of their commission the importance of gender fairness in the process of judicial selection.*

The Administrative Office of the Courts has prepared a Commissioner's Manual for the Judicial Nomination Commission. This manual addresses conflicts of interest for members and appropriate areas of questions to be asked of applicants. It provides a basic education tool for commission members. It explains the process and requires all commission members to be fair and impartial in their role in the process. The oath taken by all commission members includes the following statement, "I agree not to discriminate against any applicant because of the applicant's race, religion, gender, political affiliation, age or national origin." A training videotape is also available and includes gender issues.

The number of female judges has increased including the first female judge on the Nebraska Supreme Court. There are currently 17 female judges. The manner of application and selection process will continue to be under scrutiny.

Law Schools

There are two Nebraska law schools. The University of Nebraska College of Law and the Creighton University School of Law. While the number of graduates of these schools who practice in Nebraska is not formally tracked, a significant number exist. The Gender Fairness Implementation Committee agreed that although the Nebraska Supreme Court does not have the authority to make formal recommendations to law schools, the committee encourages the Nebraska Supreme Court to engage in dialogue with these institutions concerning the following recommendations.

- 1. Encourage law schools to educate their faculty and students about the subtle and overt manipulations of gender bias directed against attorneys, witnesses and litigants.*

2. *Encourage law schools to intervene to correct inappropriate gender related conduct of law students, law professors and law school administration.*
3. *Encourage law schools to integrate instruction concerning inappropriate gender-related conduct and other gender fairness issues into clinical programs and classes on professional responsibility and trial advocacy.*
4. *Encourage law schools to only allow employers access to the schools placement services if the employer does not discriminate in employment on the basis of race, color, religion, sex, national origin, age, handicap or disability or other non-merit factors.*
5. *Encourage law schools to pursue a policy of providing students and graduates with equal opportunity to obtain employment without discrimination on the ground of race, color, religion, sex, national origin, age, handicap, or disability or other non-merit factors.*

As part of educating attorneys involved in the hiring process, the UNL-Law school now sends attorneys a pamphlet on fair and effective interviewing. The video, *All Things Being Equal*, is also available for checkout through the Nebraska Law School.

The Deans of the University of Nebraska College of Law and Creighton University School of Law have both expressed interest in the projects of the Gender Fairness Implementation Committee. The UNL College of Law is planning to use the Mixed Blood Theater group in 1999.

The Courtroom Interaction Subcommittee

Recommendations:

Standards of bias free behavior for all participants in the judicial system should be incorporated into such documents as the Nebraska Code of Judicial Conduct and Code of Professional Responsibility.

The Nebraska Code of Judicial Conduct was reviewed and it was determined that it does contain language intended to impose upon judges the need to perform duties impartially and diligently including specific language as to gender.

Upon review of the Code of Professional Responsibility, similar language was absent mandating that lawyers refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel, or others based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. Adding such language would not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in a proceeding. The House of Delegates, at their October 1997 meeting, passed a resolution to petition the Nebraska Supreme Court to adopt two amendments concerning nondiscrimination. One amendment was to the Ethical Considerations and the other was to the Disciplinary Rules governing attorneys.

The following amendment to Disciplinary Rule 1-102(A)(5) was adopted by the Nebraska Supreme Court in June of 1998.

(A) A lawyer shall not:

- (5) Engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer should not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, or religion. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

Although this issue was very controversial, the dialogue was constructive and helpful for many. A similar amendment to an Ethical Consideration may be examined in the near future.

It was also recommended that a publication or a gender fairness handbook be available to all participants in the judicial system with suggested guidelines for gender fair behavior. This handbook is intended to serve as a reminder to those who are already "educated" but may be forgetful. The handbook was sent to all court employees, judges, bar membership and is available to other interested parties.

The Domestic Violence and Sexual Assault Subcommittee

Recommendations:

A specific subcommittee should be appointed to oversee the implementation of the recommendations in the area of domestic violence and sexual assault. The purpose of this subcommittee is to ensure that adequate resources are available for effective judicial management of sexual assault and domestic violence cases.

This recommendation was completed with the appointment of the subcommittee on Domestic Violence and Sexual Assault.

Domestic violence and sexual assault are matters of serious civil and criminal conduct. A review of the bonding procedure and sentencing procedure in protection order cases should be undertaken to ensure that adequate information is available to judges at such proceedings.

Encourage the development of ongoing education programs in the area of domestic violence and sexual assault. Written materials regarding domestic violence and sexual assault should be updated and included in the Nebraska Bench Book.

A comprehensive, uniform data collection system regarding domestic violence and sexual assault cases should be developed and the information made retrievable on a statewide basis. The information should include:

- 1) Gender of crime victims and perpetrator;*
- 2) Representation of the defendant;*
- 3) Plea reduction data;*
- 4) Disposition;*
- 5) Prior criminal history of the defendant; and*
- 6) Probation violation.*

The subcommittee focused on six areas to accomplish these recommendations. They included: *the education of the judiciary, legislation, bond setting, protection orders, establishment of a statewide registry of protection orders, and changes in penal statutes and defining domestic assault.*

The Subcommittee on Domestic Violence and Sexual Assault worked with the Nebraska State Bar Association's Legislative Committee and has also participated in a Domestic Violence Symposium. The symposium, organized by the Legislature's Judiciary Committee, included representatives of interested groups sharing the interest of fighting domestic violence. The goal of this group was to propose and support legislation in the 1998 legislative session. The issues for legislation included possible changes in the procedure for obtaining a protection order, as well as enhanced penalties for the violation of a second or subsequent protection orders, requirements for the enforcement of foreign protection orders, and attaching a penalty to the violation of a no-

contact provision as a condition of bail, recognizance or a conditioned release.

Legislation was passed in the 1998 session expanding relief available in protection orders. The most significant change is the allowance of temporary custody, up to 90 days, in protection orders. Attorney access remains an issue to be addressed. This subcommittee has also recommended that written materials regarding domestic violence and sexual assault be updated and included in the Nebraska Bench Book. Representatives from the UNL College of Law, including the Dean, have shown an interest in this project. There is no major legislation anticipated for the next session; there may be some clean-up legislation to clarify the existing statutes.

Many other issues were identified and will continue to be discussed. Some issues did not require legislation but were identified as areas for education and training for court and law enforcement personnel. These issues include: Allowing a parent or guardian whose children are victims of domestic abuse to file for a protection order on behalf of the child; Informing law enforcement personnel that an invitation by the petitioner “permitting” the respondent to violate a protection order does not nullify the protection order and the respondent, not the petitioner, should be arrested; Informing court personnel that mutual protection orders should not be granted; and Informing court and law enforcement personnel that a protection order issued anywhere in Nebraska should be enforced throughout the state.

The Litigation Subcommittee

Recommendations:

Periodically examine civil and criminal jury instructions contained in the Nebraska Jury Instructions for recommendations regarding possible amendments to eliminate subtle forms of gender discrimination.

Subcommittees should identify a funding source for a study to be conducted to determine the degree to which the economic burden of divorce is falling disproportionately upon mothers with children and single women.

The Litigation Committee is working with the Education Subcommittee in the production of a videotape for presentation on issues of gender fairness in litigation matters.(See *Education Subcommittee* section.)

The Litigation Subcommittee was also involved with the theater-based production addressing the recognition and elimination of bias and the promotion of diversity in the legal profession. This production was presented at the 1998 annual NSBA meeting.

Funding for both projects, the videotape and the theatrical production, was received from the Nebraska State Bar Association and a grant from the Nebraska State Bar Foundation.

The results of a survey conducted by the Nebraska State Bar Association (NSBA) included suggestions from members that the NSBA include more women in leadership roles, require gender neutral written materials and develop a training video on gender fairness issues.

The Executive Director of the Nebraska State Bar Association offered the Implementation Committee the use of resources including materials from the Minnesota Bar Association including videotapes, diversity committee reports, workbooks, and diversity strategy programs.